United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

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77-1052

To be argued by
DOUGLAS K. MANSFIELD

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1052

UNITED STATES OF AMERICA,
Appellee,

—v.—

VINCENT DI NAPOLI,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

DAVID G. TRAGER,
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Preliminary Statement

Vincent Di Napoli appeals from a judgment of conviction entered in the United States District Court for the Eastern District of New York on January 14, 1977 (Costantino, *J.*), after a jury trial on a one count indictment charging him with conspiring to unlawfully influence, by bribery, the outcome of horse races at Pocono Downs, Pennsylvania (18 U.S.C. § 224). Appellant was sentenced to a term of three years, to be served by three months of weekend imprisonment and the balance on probation; he also was fined $1,000. Appellant is free pending appeal.

On appeal appellant contends that the district court erred in three of its rulings, each allegedly significant enough to require reversal. Specifically, appellant claims the district court erred: (1) in excluding extrinsic evidence of a Government witness's alleged bias even though

no proper foundation had been established; (2) in ruling that a prior State conviction, on which a "certificate of relief from disabilities" had been issued, was admissible to attack appellant's credibility; and (3) in denying appellant a hearing on the issue of an alleged delay in prosecution. Appellant further contends that the prosecutor committed prejudicial misconduct in cross-examination and summation.

Statement of Facts

In October 1970, Salvatore Montello received a telephone call from a jockey, Jimmy Davis, who invited him to the last four nights of races at Pocono Downs racetrack to fix horse races (A. 71).[1] Montello then contacted appellant, who agreed to provide $5,000 to fix races (A. 73-74). Montello, appellant, and James Santamaria met at Montello's house on Long Island to confirm their agreement, and the three men thereupon travelled separately to Pocono Downs, Wilkes Barre, Pennsylvania (A. 74, 152-154).

For four successive days, from October 14 through 17, 1970, meetings took place in Montello's hotel room to plan the sheme to fix each evening's "Big Exacta" races at Pocono Downs. Appellant, who arrived in Wilkes Barre during the first evening's races, was present for the final three such meetings (A. 95-96, 102-103, 107-108).

The conspirators' scheme was to assure themselves of success on Pocono Downs' nightly "Big Exacta" by bribing jockeys. The "Big Exacta" is a form of bet

[1] Numbers in parenthesis preceded by "A." refer to pages of the Joint Appendix; references preceded by "Tr." are to the trial transcript.

whereby the bettor must select both the first and second place horses in both the seventh and eighth races on the evening's racing card (A. 79). The conspirators first determined which horses in the seventh and eighth races were favorites, running at short odds (A. 80). The conspirators then paid bribes of $200 to $500 per rider to the jockeys riding the favorites so that those jockeys' horses would not finish first or second in the seventh and eighth races (A. 81). These bribes were paid both in Montello's hotel room in appellant's presence, and with his participation, and also through the jockey Jimmy Davis, who distributed bribe money to fellow jockeys (A. 95-96, 102-103, 107-108; Tr. 294). Finally, each night the conspirators would go to the race track and purchase all possible combinations of the Big Exacta which excluded those horses whose jockeys had been bribed (A. 83).

Through their bribes of favored horses, appellant and his co-conspirators not only reduced the number of tickets they had to purchase to assure themselves of a winner, but they also guaranteed themselves a large payoff, since the races would be won by long-shots. In fact, they won on all four nights, cashing winning tickets of $28,090.80, $5,691.80, $8,504.20, and $48,536.60 in the four "Big Exactas" which they fixed. The winning ticket was cashed the first night by appellant's father, and the winning tickets the other three nights were cashed by Eddie Feder, appellant's associate (A. 84; Tr. 368).

Subsequent to each evenings' races, the conspirators returned to the hotel room and split their winnings (A. 86, 114). On October 17, 1970, after the last "Big Exacta", in which $48,536.60 was won, the conspirators paid additional money to the jockeys who had held up their horses (A. 115-116).

At trial, many of the facts described above were not in issue. It was undisputed that appellant was present with Montello at Pocono Downs on the four days in question, that the "Big Exacta" was won on relative long shots each night, and that the winning tickets were cashed by appellant's father and Eddie Feder. Appellant's defense was simply that he had not participated in the fixing of races. Three witnesses, however, testified otherwise.

Salvatore Montello related the entire venture, from the initial plan, to the daily bribe meetings, to the nightly betting, to the splitting of the profits. In addition, two jockeys, Jimmy Davis and Clint Fromal, testified to the crucial element, appellant's presence at and participation in the meeting where the jockeys were bribed. Davis testified that appellant had been present in the hotel room at the meetings where bribe amounts were discussed and where bribe money was paid (Tr. 291, 294, 296, 303). Davis also testified that on one of these occasions, appellant had argued that the bribe being paid to one rider was too high (Tr. 293). Finally, Davis testified to appellant's presence at and participation in the division of the huge payoff on the last night (Tr. 301). Fromal also testified that appellant had been present for discussions of which riders could be bribed and that Fromal himself had received $300 in front of appellant (Tr. 35-54). The two jockeys' testimony on these points was uncontradicted

ARGUMENT

POINT I

The Trial Judge Properly Excluded Extrinsic Evidence of a Witness's Bias Where the Witness had not Been Confronted With His Prior Statement.

Appellant contends that "[t]he trial court prevented [him] from exposing to the jury the accuser's malignant motives." In fact, the record entirely fails to bear out this assertion. Instead, it was appellant who failed to establish the foundation necessary to the admission of whatever evidence of bias he wished to adduce concerning Government witness Salvatore Montello.

Montello who was one of the Government's principal witnesses, gave eyewitness testimony sufficient in itself to support appellant's conviction. Appellant's attorney conducted a lengthy cross-examination of Montello, yet the questioning did not even remotely bear upon certain prior statements of Montello which appellant argues reveal Montello's bias. The omission of any cross-examination based on the statements was not inadvertent or the result of ignorance. Appellant's attorney, as the record indicates knew about the statement at the time of Montello's cross-examination (A. 474); in fact, he was even at that time intending to introduce those statements through Montello's wife as part of the defense's case. In short, counsel sought to do that which Rule 613(b), Federal Rules of Evidence, forbids: he sought to introduce extrinsic evidence of a witness's prior statement showing bias without affording the witness a chance to explain or deny the statement and without affording the

prosecution an opportunity to examine the witness on the statement.[2]

Upon objection and an offer of proof, the trial judge excluded the extrinsic evidence of Montello's prior statement on the ground that a proper foundation had not been laid. That ruling was in accordance not only with Rule 613(b) but also with this Court's recent decision in *United States* v. *Harvey*, 547 F.2d 720, 722 (2d Cir. 1976). In *Harvey* the Court said:

> This Circuit follows the rule, applicable in a number of other Circuits, that a proper foundation must be laid before extrinsic evidence of bias may be introduced. Prior to the proffer of extrinsic evidence, a witness must be provided an opportunity to explain the circumstances suggesting bias (citations omitted).

See also, 10 Moore's Federal Practice § 613.02 at VI-214:

> [The rule] merely provides that a witness have any opportunity to explain or deny a prior inconsistent statement and that an adverse party have an opportunity to question the witness on that statement *before* any extrinsic evidence of a prior inconsistent statement is admissible (emphasis added).

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[2] Rule 613(b) provides:

Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Rule 801(d)(2).

Apparently recognizing that *Harvey* directly supports the trial judge's ruling, appellant argues alternatively that the court should have either permitted appellant to recall Montello or exercised its discretion under Rule 613(b) to dispense with the foundation requirement on the ground that the interests of justice required it. Neither argument has merit.

The first problem with appellant's position is that it incorrectly assumes that the trial judge did forbid the recall of Montello for purpose of confronting him with prior statements. The record does not support this assumption (A. 341-359). Moreover, in a post-trial decision[3] the judge explicitly stated that at trial he had ruled only that extrinsic evidence of bias would not be admitted without foundation and that the whereabouts of the witness (who was being protected under the Witness Protection Program) would not be disclosed. The court's post-trial opinion also indicated that because the prosecutor had voluntarily agreed to produce the witness, the court's ruling at trial did not reach the issue of whether the witness would be produced and be permitted to be recalled (A. 40-41).

In any event, appellant did not recall Montello for further cross-examination. Yet even if the court's ruling had been to prohibit the recall of Montello such a ruling would not have been an abuse of discretion. The testimony of Montello lasted nearly one full day and comprised approximately one-half of the testimony in the case. During most of Montello's stint on the stand he was being cross-examined, first by appellant's attorney

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[3] The court's decision was on appellant's motion for a judgment of acquittal or, in the alternative, a new trial based on the court's exclusion of evidence of Montello's bias. The moving papers and the decision are found at A. 24-41.

and then by counsel for the co-defendant. At no time during that entire day did either attorney question Montello regarding the prior statements of bias appellant's counsel later sought to introduce. On the defense case, appellant simply attempted to introduce, through Mrs. Montello, the prior statement of bias without laying any foundation whatever. The court repeatedly asserted that appellant's counsel had known of this evidence at the time of Montello's cross-examination (A. 355, 357), and appellant's counsel did not deny it; he simply claimed that co-counsel for appellant had been ignorant of the evidence.

It is fundamental that a trial judge has discretion whether or not to permit exceptions to the usual order of proof and to deny permission to recall a witness. Rule 611(a), Federal Rules of Evidence; cf. *United States* v. *Taylor*, — F.2d —, slip op. 2805, 2830 (2d Cir. April 13, 1977); *United States* v. *Burger*, 419 F.2d 1293, 1295 (5th Cir. 1969). The trial judge's ruling, even if appellant understood it to prevent recall, was therefore fully within his discretion. This is particularly so where counsel had no excuse for his failure to question the witness on the first opportunity, and where the omission was apparently in an attempt to avoid giving the witness an opportunity to explain prior statements.

The trial judge's refusal to waive the foundation requirement was likewise not an abuse of discretion. The discretionary portion of Rule 613(b) was inserted "to allow for such eventualities as the witness becoming unavailable by the time the statement is discovered." Advisory Committee's Note to Rule 613(b). It was not intended to excuse knowing omissions by counsel to give a witness a fair chance to deny or explain his statement. Cf., 3 *Weinstein's Evidence* § 613[4] at 613-23:

> Prior inconsistent statements that determine whether the case can reach the jury or that relate

> to crucial testimony should almost never be admitted if foundational requirements can be, but have not been, met.

The exclusion of the extrinsic evidence was therefore proper.

Wholly aside from the issue of the court's exercise of discretion in excluding the extrinsic evidence of Montello's bias, it is clear that such evidence would have had no effect on the jury's deliberation. It was undisputed that appellant had been present at Pocono Downs with Montello on the four nights in question, that on arrival at Pocono Downs appellant gave Montello $5,000, and that winning tickets at exceptionally long odds were cashed on each of these nights, once by appellant's father and three times by Eddie Feder, appellant's associate.

In addition, the two jockey witnesses testified that the races had in fact been fixed and that appellant had been present in the hotel room on several occasions when the fixing of races was discussed and when payments to jockeys were made. Finally, one of the jockeys testified further that appellant had participated in an argument over how much one jockey should be paid and that appellant had shared in the division of the proceeds of the last windfall. In short, because the evidence of guilt was overwhelming, the issue of Montello's bias was of little significance. The error here, if any, was harmless and is not grounds for reversal. Rule 52(a), Fed. R. Crim. Proc.

POINT II

The Trial Court's Ruling That a Prior Conviction Was Admissible To Attack Defendant's Credibility Was Proper.

At trial appellant sought a ruling from the trial judge that a "certificate of relief from disabilities" precluded the Government from using a prior conviction to impeach appellant's testimony. The trial judge declined to exclude evidence of the prior conviction, finding that the certificate of relief from disabilities, issued pursuant to New York Correction Law Section 702, did not satisfy the requirement of Rule 609(c), Federal Rules of Evidence, that the certificate be "based on a finding of the rehabilitation of the person convicted" (A. 295-308).

Appellant assigns the trial judge's ruling as error, both under the terms of Rule 609(c) and as a matter of policy. Appellant further alleges that this ruling prevented him from taking the stand in his own defense.

We respectfully submit that the court's treatment of Rule 609(c) was proper. Appellant made no showing to the court of any explicit findings, whether related to the issue of rehabilitation or otherwise, which had been made by the state court that issued the certificate (A. 42). Nor did he make any showing as to what information was before the state judge. Instead, appellant asked the trial judge to infer a finding that he had been rehabilitated from the fact that New York Correction Law § 702(2) provides that:

> Such certificate shall not be issued by the court unless the court is satisfied that:
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> * * * * *
>
> (b) the relief to be granted by the certificate is consistent with the rehabilitation of the eligible offender; . . . .

In ruling on appellant's application the trial judge noted that certificates or pardons are often issued for reasons other than a finding of innocence or rehabilitation. Rule 609(c) does not require exclusion of evidence of prior convictions based on such pardons or certificates. In fact, the Advisory Committee note to Rule 609(c) states:

> A pardon or its equivalent granted solely for the purpose of restoring civil rights lost by virtue of a conviction has no relevance to an inquiry into character.

The certificate offered by appellant is silent as to its purpose or basis, and it certainly does not imply a finding of rehabilitation, as appellant urges. The issuing state judge was simply required to satisfy himself that the relief was "consistent with the rehabilitation of the eligible offender," not that the offender had been rehabilitated. The difference is more than semantic. The most reasonable reading of § 702(2) would be that the section refers to ongoing rehabilitation rather than completed rehabilitation. In other words, a judge under § 702(2) need only find that the relief will not interfere with the rehabilitation in progress of the offender.

Apparently realizing that the certificate offered to the trial judge does not fall within the letter of Rule 609(c), appellant argues that the certificate falls within the intent of that section. We submit that he misconstrues that intent. First, as noted above, the intent of Rule 609(c) is that pardons or certificates not based on a finding of rehabilitation or innocence are of no significance. Second, appellant's arguments notwithstanding, Rule 609 embodies no policy that a defendant be permitted to put his credibility into issue with greater weight than the facts permit. Appellant cites *Luck* v. *United States*, 348 F.2d 763 (D.C. Cir. 1965), and *United States*

v. *Palumbo*, 401 F.2d 270, 273 (2d Cir. 1968), *cert. denied*, 394 U.S. 947 (1969) in support of the proposition that a defendant should be permitted to take the stand without fear of impeachment by evidence of prior crimes. Neither citation is appropriate.

Not only was *Luck* specifically disapproved of by Congress in passing the Federal Rules of Evidence, see, 3 *Weinstein's Evidence* ¶ 609[01] at 609-49, 609-54, but its dictum was promptly clarified by the District of Columbia Circuit in *Gordon* v. *United States*, 383 F.2d 936, 941 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 1029 (1968). In *Gordon*, the District of Columbia Circuit approved use of a prior conviction for impeachment, in part, because prior convictions, as here, had been used by the defendant to impeach the principal government witness. The Court said, 383 F.2d at 941:

> [T]he admission of appellant's criminal record here, along with the criminal record of the complaining witness, was not in a vindictive or "eye" for an eye" sense, as appellant argues. Rather it was received because the case had narrowed to the credibility of two persons—the accuser and the accused—and in those circumstances there was greater, not less, compelling reason for exploring all avenues which would shed light on which of the two witnesses was to be believed.

Finally, *United States* v. *Palumbo*, *supra*, cited by appellant, does not require exclusion here. *Palumbo*, a pre-Rule 609 case, stands only for the proposition that a trial judge has *discretion* to exclude evidence of a prior conviction where that conviction is minimally relevant to credibility but creates an undue risk of unfair prejudice. In fact, in *Palumbo* this Court cautioned that a mechanical rule of exclusion "may allow an accused to

appear as one entitled to belief when that is not the fact." 401 F.2d at 273.

The trial judge did not abuse his discretion in admitting prior conviction evidence, and he correctly held that exclusion was not required by Rule 609(c).

POINT III

Appellant Was Not Entitled to a Hearing on the Issue of a Delay in Prosecution.

Although appellant argues that the trial court erred in denying him a hearing on the issue of prosecutorial delay, he cites no authority showing his entitlement to such a hearing. On this appeal no argument is made that speedy trial rights were violated. Appellant does cite *United States* v. *Marion*, 404 U.S. 307 (1971), but neither *Marion* nor the other cases appellant cites dealing with pre-indictment delay require reversal here.

Marion held that pre-indictment delay does not violate a defendant's Sixth Amendment right to a speedy trial and that pre-indictment delay can require dismissal on due process grounds only upon a showing of intentional delay by the prosector for the purpose of obtaining a tactical advantage and actual prejudice to the defendant as a result.[1] Appellant showed neither element in seeking a hearing.

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[1] Although this Court noted in *United States* v. *Vispi*, 545 F. 2d 328 (2d Cir 1976), and *United States* v. *Finkelstein*, 526 F.2d 517 (2d Cir. 1975), that it has never been squarely faced with the question of whether the *Marion* tests should be read in the disjunctive or the conjunctive, dictum in this Court, *United States* v. *Mejias*, — F.2d —, slip op. 2269-93 (2d Cir. March 10, 1977); *United States* v. *Frank*, 520 F.2d 1287 (2d Cir. 1975); *United States* v. *Brown*, 511 F.2d 920 (2d Cir. 1975), indicates that both tests must be met.

In his moving papers below (A. 9-10), appellant simply set forth: (a) the fact that an indictment had been returned 4 years and 360 days after the date of the offense, and (b) that "the mere lapse of time will make it extremely difficult to locate witnesses and establish alibi, and this will be made even more impossible since the dates alleged are only approximate." Appellant then asked that the *Government* be required to prove at a hearing that any delay was not attributable to fault on the part of the Government and that the appellant had not been prejudiced thereby.

The trial judge's denial of a hearing was clearly proper. First, the mere passage of time permits no inference of intentional delay for the purpose of seeking tactical advantage. *United States* v. *Brown*, 511 F.2d 920, 922 (2d Cir. 1975). Second, the mere possibility, or even likelihood, that a lapse of time would make it difficult to locate witnesses and establish an alibi does not constitute the particular showing of actual prejudice that is required.[5] *United States* v. *Marion, supra; United States* v. *Rubinson*, 453 F.2d 951, 961 (2d Cir. 1976); *United States* v. *Vispi*, 545 F.2d 328, 332 (2d Cir. 1976); *United States* v. *Foddrell*, 523 F.2d 86 (2d Cir. 1975). Finally, appellant had the burden of showing facts entitling him to a hearing. *United States* v. *Brown, supra*. Appellant entirely failed to meet that burden.

Not only did the trial court find appellant's moving papers insufficient; it also noted that the bulk of the delay was attributable to the fact that the Government was entirely unaware of the crime until July 14, 1975,

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[5] In *Marion* the Supreme Court noted that a defendant's protection against such potential prejudice lies in the statutes of limitations. 404 U.S. at 322.

when it was first revealed by the witness Montello. The indictment was returned less than three months later.[6] This Court has held that the Government is not responsible for a period of delay when an important witness is unavailable to it, *United States* v. *Cheung*, — F.2d —, slip op. 2063 (2d Cir., Feb. 28, 1977); *United States* v. *Frank*, *supra*. In addition, this Court has held that the continued investigation of a crime by the Government after it has acquired *prima facie* evidence is not improper delay. *United States* v. *Rubinson*, *supra*; *United States* v. *Foddrell*, *supra*; *United States* v. *Finkelstein*, 526 F.2d 517, 526 (2d Cir. 1975); see also, *United States* v. *Mejias*, 417 F. Supp. 596 (S.D.N.Y. 1976).

Appellant's request for a hearing was properly denied.

POINT IV

The Prosecutor's Comments Were Not Improper.

Appellant cites certain passages from the Government's summation and cross-examination, arguing that these constituted prejudicial misconduct. We contend that those passages were fair comment and fair argument. They were not calculated nor likely to prejudice appellant in the eyes of the jury except as warranted by the facts. Nor was defendant's case unfairly prejudiced by any remarks by the prosecutor.

An objection was raised regarding the prosecution's question to Montello regarding a threat made against his

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[6] At the time the indictment was returned it was sealed by the court upon a representation by the government that the grand jury investigation was continuing. That investigation resulted in six further indictments (A. 15). The indictment here was unsealed four months after it was filed.

life while he was being detained at the Federal House of Detention located at West Street, New York, New York. The question was proper, since it sought to elicit from Montello his motive for testifying. In fact, Montello's motive for testifying had been the principal theme of the opening statement of appellant's counsel. The trial judge sustained the objection to the question and answer, but he denied the mistrial motion.[7] Appellant sought no instruction. In cross-examination of Montello, appellant's counsel examined Montello at length not only regarding his motive for testifying but also regarding the attempt on his life (A. 179-182).

The other question raised on appeal to which objection was made was asked of Vincent Montello, the brother of the Government's witness Salvatore Montello. The prosecutor had reason to believe that Vincent Montello's animosity toward his brother (he had just called him "a bum") lay in the fact that Salvatore's cooperation with the Government against a friend violated principles under which both brothers had been raised. The specific reference to Italians may have been unfortunate, but the question sought relevant information. In any event, the question was struck and no harm was done.

Two other comments are being attacked for the first time on appeal. Probably because neither unfairness nor prejudice was apparent, these comments were neither the subject of objection below nor of any attempt to obtain a curative instruction. Inasmuch as these in-

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[7] Appellant's assertion that "the same thing had happened at an earlier trial involving other defendants" has no basis in the record. The quotation that "there was an admonition by the Court" is from the unsupported claim of appellant's counsel. In fact, that claim is false. At the earlier trial, Judge Weinstein had permitted Montello to testify that his cooperation was motivated by a threat to his life which had taken place at West Street.

stances did not affect the substantial rights of the appellant they should not be considered now on appeal for the first time. *United States* v. *Rose*, 500 F.2d 12, 17 (2d Cir. 1974); *United States* v. *Indiviglio*, 352 F.2d 276, 280-81 (2d Cir. 1965), (en banc), *cert. denied*, 383 U.S. 907 (1966).

CONCLUSION

The judgment of conviction should be affirmed.

Dated: April 29, 1977

Respectfully submitted,

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Eastern District of New York.

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AFFIDAVIT OF MAILING

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COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

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deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 2nd day of May 19 77 he served a copy of the within

BRIEF FOR THE UNITED STATES OF AMERICA

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Dolores M. Byrd

Sworn to before me this
2nd day of May 19 77

Carolyn N. Johnson

NOTARY PUBLIC, State of New York
No. 41-4614[illegible]
Qualified in Queens County
Term Expires March 30, 1979